BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADAM SHANE DOOLIN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,051,683
WAL-MART	)	& 1,053,820
Respondent	)	
AND	)	
	)	
ILLINOIS NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 12, 2011, preliminary hearing Order of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded medical treatment with respondent/insurance carrier to provide a list of three specialists from which claimant was to select one, and claimant was granted temporary total disability compensation (TTD) beginning on February 13, 2010, and continuing until released to substantial and gainful employment by the treating physician. The ALJ found that claimant had suffered a compensable accident on or about July 2, 2010.

Claimant appeared by his attorney, David A. Slocum of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael R. Kauphusman/Ryan D. Weltz of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held May 10, 2011, with attachments, and the documents filed of record in this matter.

ISSUES

1. Did claimant meet with personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant failed to prove that his alleged injury to his back was the result of his on-the-job accident. Claimant contends that his duties, which required lifting, bending and

stooping while carrying weights from up to 40 to 50 pounds, caused his back pain to worsen over time.

2. Did claimant provide timely notice of his alleged accident? In order to determine the timeliness of notice, it is first necessary to determine the date of accident.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a sales associate in respondent's Lawn and Garden department. Claimant assisted customers, moved merchandise, stocked shelves and moved inventory. This required regular lifting and bending, working with weights of up to 40 to 50 pounds.

While performing his duties for respondent on April 9, 2010, claimant noticed low back pain after lifting. Claimant did not describe any sudden pain or pop, or any traumatic event leading to this pain. Just the normal job duties led to the onset of the symptoms. Claimant assumed that this was a strain and did nothing on that date. The next day, April 10, 2010, claimant again was performing his job duties when his low back pain increased. Claimant advised his supervisor, Scott Kelly, respondent's assistant manager, of the pain and asked to go home early. Mr. Kelly admits that claimant told him of back pain, but denies being told that the pain was caused by claimant's job duties with respondent.

That night, claimant went to the emergency room (ER) at St. John's Hospital in Leavenworth, Kansas, complaining of back pain which began the day before as the result of a gradual onset. The ER notes indicate no history of recent trauma. Claimant did advise that he was doing heavy lifting the day before, and the ER notes state that the "[s]ymptoms seem to be related to muscle strain related to lifting."[1]

Claimant went to Nicholas Brockert, M.D., on April 14, 2010. Dr. Brockert noted that claimant did some heavy lifting last week and claimant may have "overdid it".[2] The note from April 14 also indicated that claimant was currently asymptomatic, except for an occasional spasm of the left lower back muscle. Claimant testified that he had been off work during the four days leading up to the April 14, 2010, examination. However, when claimant was re-examined by Dr. Brockert on April 21, his symptoms had worsened. The only noted aggravating factor contributing to the pain was lifting, with stiffness from

[1] P.H. Trans., Cl. Ex. 1.

[2] P.H. Trans., Cl. Ex. 1.

prolonged standing. Claimant had returned to work with respondent on April 16, 2010, performing his regular duties, as respondent did not provide any light-duty work. Claimant testified that his back condition then worsened to the point that he could hardly walk from one end of the store to another.

On July 2, 2010, claimant reported the matter, requesting workers compensation benefits. He filled out an Associate Statement-Workers Compensation form on July 1, 2010, and an Associate Incident Log Form on July 2, 2010. On July 6, 2010, claimant was referred by respondent to OHS CompCare where he was examined by William T. Raue, D.O. Claimant listed a date of accident as July 2, 2010, but the July 6 report notes the problem had been present for about two and a half months. Claimant reported recurrent episodes from lifting 40-pound bags of soil and mulch. An MRI done at St. Luke's revealed early changes with degenerative disk disease at L5-S1. Claimant displayed ongoing pain from T4 to L4, and pain over the left SIJ and L5-S1 at the midline. Claimant was noted to be grossly obese. At the time of the preliminary hearing, he stood 5'10" and weighed 324 pounds. Physical therapy was recommended but not yet provided at the time of the July 6, 2010, report.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on February 4, 2011. Dr. Prostic noted an accident date of April 10, 2010, while claimant was lifting bags of soil. The MRI identifying degenerative disk disease at L5-S1 was discussed. Claimant displayed signs of S1 radiculopathy, and therapy was again recommended. In an addendum report dated March 7, 2011, Dr. Prostic stated that claimant had experienced repetitive bending and lifting at work leading to the low back condition diagnosed during the February examination. Dr. Prostic did not re-examine claimant at the time the March report was created.

Claimant was referred by respondent to board certified orthopedic surgeon David K. Ebelke, M.D., on April 19, 2011. The injury history included lifting bags of soil weighing 40 pounds. Claimant reported that physical therapy had finally begun, and he was displaying improvement with his pain symptoms as the result. ER records from St. John's Hospital in Leavenworth, Kansas, discussed a fall on August 8, 2008, while claimant was working at home. Dr. Ebelke found claimant to be morbidly obese, with a body weight of 316 pounds. Claimant's weight overloaded his spine leading to back pain. Additionally, Dr. Ebelke found the lifting of heavy objects would further overload his spine, causing added pain complaints.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

[3] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

Respondent contends that claimant did not suffer personal injury by accident which arose out of and in the course of his employment. However, the medical records created contemporaneous with the aggravating activities discuss the heavy lifting associated with claimant's job. The ER notes on April 10, 2010, from St. John's Hospital discuss the heavy lifting. Additionally, the notes from Dr. Brockert on April 14, 2010, indicate that claimant may have overdone it with the heavy lifting the week before. Additionally, when claimant saw Dr. Brockert on April 14, his symptoms appeared to be improving. But, on April 21, 2010, after claimant had returned to work and the heavy lifting, his symptoms were markedly worse. This Board Member finds that claimant did suffer personal injury by accident which arose out of and in the course of his employment with respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[7]

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[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2009 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] K.S.A. 44-520.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[8]

The notice statute requires notice within 10 days of the accident. However, the date of accident determination from a series of traumas is a legal fiction that has become unusually difficult to determine with the passage of K.S.A. 2009 Supp. 44-508(d). In this instance, claimant was not treated by an authorized physician until after the July 2, 2010, notice was provided to respondent. So the first two criteria for determining a date of accident had not been met. Claimant did provide written notice of the accident on July 2, 2010. This is the earliest of dates identified in K.S.A. 2009 Supp. 44-508(d) as a possible date of accident. This workers compensation document satisfies the criteria of the statute and sets the date of accident as July 2, 2010. Since claimant provided the written notice on that date as well, the requirements of K.S.A. 44-520 have been satisfied and notice was timely provided.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent through a series of traumas ending on July 2, 2010, with notice being timely provided. The Order of the ALJ should be affirmed.

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[8] K.S.A. 2009 Supp. 44-508(d).

[9] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 12, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

HONORABLE GARY M. KORTE

c: David A. Slocum, Attorney for Claimant
Michael R. Kauphusman/Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge